

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SATANAND SHARMA *et al.*,) Civil No. 10cv133-L(JMA)
Plaintiffs,) **ORDER GRANTING**
v.) **DEFENDANT'S MOTION TO**
FEDERAL DEPOSIT INSURANCE) **DISMISS AND DISMISSING**
CORPORATION,) **ACTION WITHOUT PREJUDICE**
Defendant.)

)

Plaintiffs filed this action pursuant to the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* (“APA”) to obtain an order directing the Federal Deposit Insurance Corporation (“FDIC”) to enforce against third parties injunctions obtained in unrelated litigation. The FDIC filed a motion to dismiss, which Plaintiffs did not oppose. For the reasons which follow, the FDIC’s motion is **GRANTED**.

“If an opposing party fails to file papers in the manner required by Civil Local Rule 7.1(e)(2), that failure may constitute a consent to the granting of a motion or other request for ruling by the court.” Civ. Loc. R. 7.1(f)(3). “Failure to follow a district court’s local rules is a proper ground for dismissal.” *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (dismissal of a *pro se* prisoner’s complaint pursuant to local rule for failure to file an opposition to a motion to dismiss).

“Before dismissing the action, the district court is required to weigh several factors: (1)

1 the public's interest in expeditious resolution of litigation; (2) the court's need to manage its
 2 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
 3 cases on their merits; and (5) the availability of less drastic sanctions." *Id.* (internal quotation
 4 marks and citations omitted). The court is mindful that "[p]ublic policy favors disposition of
 5 cases on the merits," which weighs against dismissal. *Pagtalunan v. Galaza*, 291 F.3d 639, 643
 6 (9th Cir. 2002). Nevertheless, dismissal is appropriate in cases where other factors support it.
 7 *See, e.g., id.* at 643; *Yourish v. Cal. Amplifier*, 191 F.3d 983, 990, 992 (9th Cir. 1999). "The
 8 public's interest in expeditious resolution of litigation always favors dismissal." *Yourish*, 191
 9 F.3d at 990. Furthermore, "[i]t is incumbent upon the Court to manage its docket without being
 10 subject to routine noncompliance of litigants such as" Plaintiffs in this case. *See Pagtalunan*,
 11 291 F.3d at 642. This factor therefore also favors dismissal. Next, "the risk of prejudice to the
 12 defendant is related to plaintiff's reason for defaulting in failing to timely" comply with the due
 13 dates established by local rules. *See Yourish*, 191 F.3d at 991. Plaintiffs have not taken any
 14 action in this case since filing the complaint and proof of service of summons, and they have
 15 offered no excuse for their lack of activity and the resulting delay. "Unnecessary delay
 16 inherently increases the risk that witnesses' memories will fade and evidence will become stale."
 17 *Pagtalunan*, 291 F.3d at 643. The prejudice factor, supported by unexplained and lengthy delay,
 18 also favors dismissal in this case. Less drastic sanctions short of outright dismissal - such as a
 19 formal reprimand, imposition of costs or attorney fees, or an adjudication of the motion without
 20 the benefit of plaintiffs' arguments in opposition are available. However, Plaintiffs have not
 21 presented any argument why they should receive the benefit of the lesser sanctions in light of
 22 their complete failure to prosecute this case. Accordingly, this factor is neutral at best. Based on
 23 the foregoing, FDIC's motion to dismiss is **GRANTED**. The complaint is **DISMISSED**
 24 **WITHOUT PREJUDICE** pursuant to Civil Local Rule 7.1(f)(3) and Federal Rule of Civil
 25 Procedure 41(b) for failure to oppose the motion.

26 In the alternative, the court considers the motion on the merits without the benefit of
 27 Plaintiffs' opposition. Plaintiffs allege that they borrowed money from Imperial Creditcorp, a
 28 division of Imperial Bank, and secured the loan with a deed of trust. Subsequently, National

1 Enterprises, Inc. (“NEI”) purchased the debt from Imperial Creditcorp, a federally insured
2 institution. Because Plaintiffs did not pay the debt when due, NEI filed a collection action in
3 State court and obtained a judgment in 1997. NEI has attempted to collect on the judgment since
4 then.

5 Plaintiffs requested the FDIC to enforce two injunctions issued in unrelated litigation to
6 stop NEI from enforcing its judgment against Plaintiffs. In November 2000, the FDIC obtained
7 an injunctive order against Roque de la Fuente pursuant to 12 U.S.C. Section 1818(e), removing
8 him from the board of the First International Bank and precluding him from participating in any
9 conduct of the affairs of any federally insured depository institutions (“Injunctive Order”).
10 (Compl. at 6 & Ex. 3.) In the process of deciding whether to remove Mr. de la Fuente, the FDIC
11 concluded that NEI was controlled by him for purposes of Regulation O, which places limits on
12 loans to insiders. (*Id.* Ex. 3.) In another lawsuit, the FDIC, in its capacity as a receiver of an
13 insolvent federal savings bank, filed a cross-claim against NEI alleging that NEI purchased an
14 obligation owing to the failed institution by fraudulently representing that it was eligible to
15 acquire the obligation. (*See Nat'l Enter., Inc. v. Joseph-Burnham P'ship et al.*, U.S. Dist. Ct.
16 S.D. Cal. case no. 97cv1185-B(LAB), docket no. 23 (Cross-Claim Against Nat'l Enter., Inc.).)
17 After a settlement conference, in 1998 the court entered an injunction permanently restraining
18 NEI and others from engaging in business with the FDIC, including a prohibition of purchasing
19 assets directly from the FDIC (“Stipulated Injunction”). (*Id.* docket no. 200, 201, 210 & 211;
20 *see also* Compl. at 7-8 & Ex. 4.) Because the FDIC declined Plaintiffs' request to enforce the
21 two injunctive orders so as to preclude NEI from enforcing its judgment against Plaintiffs, they
22 filed the instant action pursuant to the APA.

23 The APA contains comprehensive provisions for judicial review of agency actions.
24 *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) citing 5 U.S.C. §§ 701-706. A person “adversely
25 affected or aggrieved” by agency action is entitled to judicial review of the action, including
26 failure to act, as long as the action is a “final agency action for which there is no other adequate
27 remedy in court.” *Id.* citing 5 U.S.C. §§ 702 & 704. The APA applies “except to the extent that
28 [¶] (1) statutes preclude judicial review; or [¶] (2) agency action is committed to agency

1 discretion by law.” 5 U.S.C. § 701(a); *Heckler*, 470 U.S. at 828. The FDIC argues that these
 2 exceptions preclude judicial review in this case.

3 The FDIC’s decision not to enforce the Injunctive Order is not reviewable pursuant to the
 4 exception under 5 U.S.C. Section 701(a)(1). This exception “requires construction of the
 5 substantive statute involved to determine whether Congress intended to preclude judicial review
 6 of certain decisions.” *Heckler*, 470 U.S. at 828. The Injunctive Order was issued pursuant to 12
 7 U.S.C. Section 1818(e). Section 1818 contains a provision which expressly precludes judicial
 8 review of the FDIC’s decision not to enforce the injunction:

9 The appropriate Federal banking agency may in its discretion apply to the United
 10 States district court . . . for the enforcement of any effective and outstanding notice
 11 or order issued under this section . . . , and such courts shall have jurisdiction and
 12 power to order and require compliance herewith; *but except as otherwise provided*
 13 *in this section . . . no court shall have jurisdiction to affect by injunction or*
 14 *otherwise the . . . enforcement of any notice or order under any such section . . .*

15 12 U.S.C. § 1818(i)(1) (emphasis added). Accordingly, because section 1818(i) precludes
 16 judicial review of the FDIC’s decision not to enforce the Injunctive Order, review is also
 17 precluded by 5 U.S.C. Section 701(a)(1).¹

18 The FDIC’s decision not to enforce the Stipulated Injunction is not reviewable pursuant
 19 to 5 U.S.C. Section 701(a)(2). An agency’s decision not to enforce “is a decision generally
 20 committed to an agency’s absolute discretion.” *Heckler*, 470 U.S. at 831. Such decisions are
 21 generally unsuitable for judicial review for many reasons:

22 First, an agency decision not to enforce often involves a complicated balancing of
 23 a number of factors which are peculiarly within its expertise. Thus, the agency
 24 must not only assess whether a violation has occurred, but whether agency
 25 resources are best spent on this violation or another, whether the agency is likely to
 26 succeed if it acts, whether the particular enforcement action requested best fits the
 27 agency’s overall policies, and, indeed, whether the agency has enough resources to
 28 undertake the action at all. An agency generally cannot act against each technical
 violation of the statute it is charged with enforcing. The agency is far better
 equipped than the courts to deal with the many variables involved in the proper
 ordering of its priorities.

26 ¹ Even if the APA provided for judicial review, it would be unavailing in this case.
 27 The Injunctive Order applies to Mr. de la Fuente, but Plaintiffs’ debt was acquired by NEI. (*Cf.*
 28 Compl. at 6 & Ex. 3 with *id.* at 9.) Furthermore, the Injunctive order enjoins participation in
 conduct of the affairs of any “insured depository institution.” (*Id.* at 6.) When NEI purchased
 the obligation, it belonged to NEI rather than an “insured depository institution.”

1
2 *Id.* at 831-32. Furthermore, when review is requested of an agency's failure to act, judicial
3 review would often lack the necessary focus:

4 [W]hen an agency refuses to act it generally does not exercise its *coercive* power
5 over an individual's liberty or property rights, and thus does not infringe upon
6 areas that courts often are called upon to protect. Similarly, when an agency does
7 act to enforce, that action itself provides a focus for judicial review, inasmuch as
8 the agency must have exercised its power in some manner. The action at least can
9 be reviewed to determine whether the agency exceeded its statutory powers.

10 *Id.* at 832 (emphasis in original). For these reasons, an agency's decision not to take
11 enforcement action is presumed immune from judicial review under section 701(a)(2). *Id.* The
12 FDIC's decision not to enforce the Stipulated Injunction as requested by Plaintiffs is therefore
13 presumptively excluded from review under the APA.

14 “[T]he presumption may be rebutted where the substantive statute has provided guidelines
15 for the agency to follow in exercising its enforcement powers.” *Id.* at 832-33 (footnote omitted).
16 “Congress may limit an agency's exercise of enforcement power if it wishes, either by setting
17 substantive priorities, or by otherwise circumscribing an agency's power to discriminate among
18 issues or cases it will pursue.” *Id.* at 833. If the Congress

19 has indicated an intent to circumscribe agency enforcement discretion, and has
20 provided meaningful standards for defining the limits of that discretion, there is
21 “law to apply” under § 701(a)(2), and courts may require that the agency follow
22 that law; if it has not, then an agency refusal to institute proceedings is a decision
23 “committed to agency discretion by law” within the meaning of that section.

24 *Id.* at 834-35. Plaintiffs have not pointed to any statute circumscribing the FDIC's enforcement
25 discretion. To the contrary, upon review of the pertinent statutes, it appears that they do not
26 place any limitation on the FDIC's exercise of its enforcement authority as it applies in the
27 context of this case. *See* 12 U.S.C. § 1811 *et seq.* Because FDIC's authority to enforce the
28 Stipulated Injunction is entirely discretionary, it is not subject to review under the APA. *See*
Heckler, 470 U.S. at 837-38.²

27 ² Even if judicial review were available, it would be unavailing. The Stipulated
28 Injunction precludes NEI from certain dealings directly with the FDIC. (Compl. Ex. 4.) To the
extents Plaintiffs base their claim on NEI's current debt collection activities, the activities are
directed at Plaintiffs and do not directly involve the FDIC. To the extent the claim is based on

1 For the foregoing reasons, the FDIC's motion to dismiss is granted on the alternative
2 ground that its decision not to enforce the injunction is excepted from review under the APA.

3 **IT IS SO ORDERED.**

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5 DATED: January 3, 2011

6 
7 M. James Lorenz
United States District Court Judge

8 COPY TO:

9 HON. JAN M. ADLER
UNITED STATES MAGISTRATE JUDGE

10 ALL PARTIES/COUNSEL

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27 NEI's purchase of the obligation, the obligation was not purchased from the FDIC directly but
from an FDIC-insured institution. (Compl. at 9.) Moreover, NEI allegedly purchased the
28 obligation in 1996 (*id.*), whereas the Stipulated Injunction was not issued until 1998 (*Id.* at 7 &
Ex. 4).